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# State v. Keithly Cross Appellant's Reply Brief Dckt. 39033

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# In the Supreme Court of the State of Idaho

Supreme Court Case Nos. 39033-2011; 39034-2011; 39035-2011; 39036-2011

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STATE OF IDAHO,

Plaintiff-Appellant,

v.

DONALD M. KEITHLY; YVETTE DAVIS;  
PATRICK COWLES; and MICHAEL SMITH,

Defendants-Respondents.

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## RESPONDENT/CROSS-APPELLANTS' REPLY BRIEF

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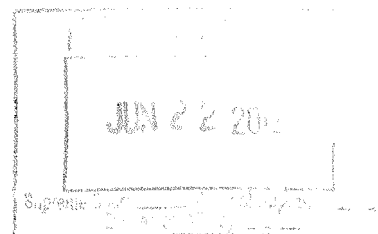
Appeal from the District Court of the Fourth Judicial District for Valley County  
Case Nos. 2011-148; 2011-46, 2011-47, & 2011-48  
Hon. Michael R. McLaughlin, presiding

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**TABLE OF CONTENTS**

<b>I.</b>	<b>ARGUMENT.....</b>	<b>1</b>
	<b>A. The VCPA erroneously believes that a board’s redundant appointment of an incumbent director supplants the plain and unambiguous text of I.C. §§ 31-4305 and 31-4306(2) that a director holds office until a successor is elected and qualified thereby rendering the incumbent a usurper of office and disenfranchising the citizenry.....</b>	<b>1</b>
	<b>B. Attorney fees.....</b>	<b>5</b>
<b>III.</b>	<b>CONCLUSION .....</b>	<b>7</b>

## TABLE OF AUTHORITIES

### Cases

<i>Big Wood Canal Co., v. Chapman</i> , 45 Idaho 380, 263 P. 45 (1927).....	1
<i>City of Heutter v. Keene</i> , 244 P.3d 157 (2010).....	1, 2, 3
<i>Clark v. Wonnacott</i> , 30 Idaho 98, 162 P. 1074 (1917) .....	1, 2, 3, 5
<i>People ex rel. Neilson v. Wilkins</i> , 101 Idaho 394, 614 P.2d 417 (1980) .....	6
<i>People v. Green</i> , 1 Idaho 235 (1869).....	1
<i>Tiegs v. Patterson</i> , 79 Idaho 365, 318 P.2d 588 (1957).....	6, 7
<i>Tiegs v. Patterson</i> , 81 Idaho 46, 336 P.2d 687 (1959).....	6, 7

### Statutes

Idaho Code § 12-117.....	5
Idaho Code § 31-4305.....	1, 3, 5
Idaho Code § 31-4306(2).....	1, 5, 7
Idaho Code § 34-2007.....	6
Idaho Code § 34-2008.....	6
Idaho Code § 34-201.....	4, 5, 6
Idaho Code § 34-206.....	3, 4, 6
Idaho Code § 34-214.....	6
Idaho Code § 34-601.....	4
Idaho Code § 59-901(6).....	1
Idaho Code § 67-303.....	1
Idaho Code § 6-903.....	8

### Other Authorities

Jerry J. Goldfeder, <i>Could Terrorists Derail a Presidential Election</i> , 32 Fordham Urban Law Journal Article 4 (2004) .....	4
Philip Lentz, <i>Election Day Attack On NY Unmakes Mayor Green</i> .....	4
<i>Sept. 11 Events Cast Giuliani as a Hero, Transfer His Aura to Free-Spending Mike</i> , CRAIN'S N.Y.BUS., Mar. 4, 2002 .....	4

## I. ARGUMENT

- A. **The VCPA erroneously believes that a board's redundant appointment of an incumbent director supplants the plain and unambiguous text of I.C. §§ 31-4305 and 31-4306(2) that a director holds office until a successor is elected and qualified thereby rendering the incumbent a usurper of office and disenfranchising the citizenry.**

As a matter of law pursuant to I.C. § 31-4305, an incumbent holds office with authority of law “until a successor is elected and has qualified”.<sup>1</sup> Yvette Davis was the incumbent sub-district (3) director. No successor had been elected and qualified. Therefore, Ms. Davis lawfully held title to office until the May 2011 election. Erroneously paraphrasing *Clark v. Wonnacott*, 30 Idaho 98, 162 P. 1074 (1917), the VCPA argues that the SVCRD’s invalid albeit redundant reappointment of Ms. Davis supersedes and supplants the plain text of I.C. § 31-4305; that the Board and Ms. Davis’ culpability acts as a waiver forfeiting an incumbent’s presumption to hold office with authority of law. Absent any controlling authority, the VCPA’s legal theory not only misapplies *Clark*, overtly contradicts the applicable statutes, but would also disenfranchise the citizenry.<sup>2</sup>

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<sup>1</sup> *City of Heutter v. Keene*, 244 P.3d 157 (2010); *Big Wood Canal Co., v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Clark v. Wonnacott*, 30 Idaho 98, 162 P. 1074 (1917), *People v. Green*, 1 Idaho 235 (1869) (the right of the incumbent to hold office until his successor is elected and qualified was as much a part of the estate in office as the original term.) See also I.C. § 67-303 which provides:

Holding office after expiration of term. Every officer elected or appointed for a fixed term shall hold office until his successor is elected or appointed and qualified, unless the statute under which he is elected or appointed expressly declares the contrary.

I.C. § 59-901(6) limits a “vacancy” to a

failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto.

<sup>2</sup> See *Clark*, 30 Idaho at 103-104, 162 P. at 1074 citing to several sources.

Unquestionably this statute was enacted with a view to preventing the office of superintendent of schools from becoming vacant during any part of the time, and unquestionably it means just what it says-in effect that one, once lawfully elected and qualified, continues to hold the office until his successor is elected and qualified.

In *Clark*, the incumbent county assessor (Wonnacott) lost in an election to McFarland, but McFarland died shortly after the election and *before* his term of office commenced. The Kootenai County Commissioners' solution was to declare the position vacant and appoint Clark to serve the remainder of the term. This Court determined that the Commissioner's appointment of someone other than the incumbent was "ineffectual and void" (as opposed to voidable).<sup>3</sup>

"There can be no appointment unless there is a vacancy; there can be no vacancy where there is an incumbent." There was in effect a statute providing that every person elected for a fixed term "shall hold office until his successor is elected .... and qualified." Thus, Wonnacott was entitled to hold the office until his successor was elected and qualified. "[U]nder our statutes the person elected to an office does not become the incumbent of the office until he qualifies." We held "that if an officer under the law is entitled to hold his office until his successor is elected and qualified, that the election of the officer does not create a vacancy, but it requires his election and qualification coupled with the expiration of his predecessor's term to create a vacancy." ... We held that Wonnacott remained the incumbent because McFarland had not qualified. "Had Mr. McFarland lived and failed to qualify there would have been no vacancy, under our statutes, because there was an incumbent to continue in office, whose right it was to hold the office until his successor was not only duly elected, but also qualified..."<sup>4</sup>

Had the SVCRD appointed someone other than Ms. Davis, the appointment would similarly be rendered ineffectual and void; irrespective of the complicity or actions of the SVCRD board. Ms. Davis' redundant appointment, even if erroneous, would only mean that Ms. Davis has usurped herself and thus the issue is moot. The conclusion to be drawn from *Clark* and *Heutter* is that the actions of the board are ineffectual, void, and thus irrelevant and do not supersede the plain text of I.C. § 31-4305.

The VCPA wishes to distinguish *Clark* from this action by asserting a "dereliction of duty by the SVCRD Board"<sup>5</sup>; that "errors in the ... election cycle ... fall squarely on the SVCRD

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<sup>3</sup> *Clark*, 30 Idaho at 108, 162 P. at 1074.

<sup>4</sup> *City of Heutter*, 244 P.3d at 159-160 (internal citations omitted). The regularly scheduled election, while not cancelled as in this action, was nonetheless rendered void and ineffectual as if it had never occurred due to McFarland's failure to qualify. The same is true here.

<sup>5</sup> Reply Brief, p. 5.

Board, which created the problem.”<sup>6</sup> It is undisputed that the VCPA does not allege nor did the district court find any “fraud or intentional wrongdoing on the part of the Directors of the SVCRD”.<sup>7</sup> Yet, the VCPA concludes that Ms. Davis, as the incumbent candidate, “was responsible for the failure to have an election”; that she “should have been aware of when her term would expire.”

No matter who the SVCRD Board delegates the responsibilities to, it is ultimately their job to prepare and publish election notices and cancellations, making sure the election schedule is followed for their district. [sic]<sup>8</sup>

This is not true. Not surprisingly, the VCPA fails to assert to any authority that vests a candidate/incumbent director with the responsibility to prepare and publish election notices and otherwise oversee the conduct of an election in which he/she is the candidate. Quite the contrary, to prevent such inherent conflicts of interest, Title 34 of the Idaho Code vests investigatory, supervisory, and administrative responsibility in the election process to the Secretary of State, the county clerks, and, at least until 2011, in the local election officials.<sup>9</sup>

Through no fault of a candidate, one can envision any number of situations where an election, for whatever reason, is cancelled, voided, or otherwise not conducted, including a

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<sup>6</sup> Reply Brief, p. 6.

<sup>7</sup> R. Vol. I, p. 18.

<sup>8</sup> Reply Brief, p. 7.

<sup>9</sup> Pursuant to I.C. § 34-1405, it is the county clerk and/or the “election official of the political subdivision” (pre-2011) who bore the sole responsibility to notice an election. Pursuant to I.C. § 34-206, the county clerk exercises general supervisory authority pertaining to the

administration of the election laws by each local election official in his county for the purpose of achieving and maintaining a maximum degree of correctness, impartiality, efficiency, and uniformity in such administration by local election officials.

(I.C. § 34-206). The Idaho Secretary of State is the chief election officer of the State and has the “responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws”. (I.C. § 34-201). The Idaho Secretary of State is responsible to provide all such comprehensive directives and election laws to all county clerks. (I.C. § 34-201). Each county clerk is required to comply with such directives and instruction by the secretary of state. *Id.*

terrorist attack<sup>10</sup>, flood, earthquake, political upheaval, death of a candidate, or human error (failure to provide enough ballots, notices, etc.).<sup>11</sup> Having missed the November election date through no fault of the candidate<sup>12</sup> and in the absence of any allegation of fraud or misconduct, Ms. Davis, as the incumbent, held office with authority of law until a successor was elected and qualified. The VCPA fails to cite to any authority demonstrating that the SVCRD's "ineffective and void" reappointment of Ms. Davis supplants I.C. § 31-4305.<sup>13</sup>

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<sup>10</sup> For example, the 9-11 attack occurred on an election day for the democratic mayoral primary. The election was reset to September 25<sup>th</sup> after "all players" (Board of election officials and the candidates) discussed and accepted the consensus to cancel and reset the election. See, e.g., Philip Lentz, *Election Day Attack On NY Unmakes Mayor Green; Sept. 11 Events Cast Giuliani as a Hero, Transfer His Aura to Free-Spending Mike*, CRAIN'S N.Y.BUS., Mar. 4, 2002, at 9.

<sup>11</sup> See Jerry J. Goldfeder, *Could Terrorists Derail a Presidential Election*, 32 Fordham Urban Law Journal Article 4 (2004).

<sup>12</sup> The VCPA goes to great length to condemn Ms. Davis and the SVCRD for following "bad advice". Since the preceding four (4) year term began in February, 2007, there was some confusion as to when this term would end, i.e. November 2011 election or February 2012 election. Given that the SVCRD missed the November election date and the Legislature's removal of February election date as an option, the earliest election was scheduled for May 2011 pursuant to I.C. § 34-601. What was to be done in the interim? The SVCRD consulted with the County's Election Officer, Jo Ann Fry, the Idaho Attorney General's Office (Brian Kane, Assistant Chief Deputy) and the Idaho Secretary of State's office (Tim Hurst, Chief Deputy) who cooperatively reached a solution. This is the proper procedure since the Idaho Secretary of State is the chief election officer with the "responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws". (I.C. § 34-201). Each county clerk is required to comply with such directives and instruction by the secretary of state. *Id.* The solution was to reappoint the incumbent director pending the next available election date. While an incumbent holds office until a successor is elected and qualified, the SVCRD erred on the side of caution by also reappointing the incumbent director until the May 2011 election date. Thus, whether by incumbency or appointment, the incumbent served until the next available election date.

<sup>13</sup> Other meritless arguments presented by the VCPA include:

- a. The statutory requirement of an incumbent-holder over applies in instances of a one-person office such as a county assessor in *Clark* but does not apply to a three-person board since disenfranchisement is averted since the remainder two-person board can still function. Bereft of authority, the VCPA's theory is in direct conflict with I.C. § 31-4305 which provides that "[E]ach district *shall* be governed by a board of three (3) directors." *Id.* Emphasis Added.
- b. This action is distinguishable from *Clark* since McFarland stood for election whereas Ms. Davis, "though in office for more than 10 years, had never been elected." This argument is ridiculous as no one had ever expressed a willingness to serve as a director for the SVCRD; i.e. she never had an opponent. Pursuant to I.C. § 31-4306(2), if only one candidate has been nominated for each director position and no declaration of intent is filed for a write-in candidate, the election shall be cancelled. In such instances, the Board "shall ... declare such candidate elected as director, and the secretary ... shall immediately make and deliver to such person a certificate of election."
- c. Mootness – The VCPA again asserts that its usurpation action should not be rendered moot by Yvette Davis' loss in the election because usurpation actions are viewed at the time the case is brought. This



## B. Attorney fees

Attorney fees under I.C. § 12-117 are mandatory if the Court “finds that the non-prevailing party acted without a reasonable basis in fact or law”. The VCPA claims it had standing and acted with a reasonable basis in fact and law; in fact that it was compulsorily required to “investigate procedural irregularities in the various election cycles.”<sup>14</sup> Whether the VCPA’s mere investigation reveals the existence of uncontested<sup>15</sup> procedural irregularities which transpired at the time of the election<sup>16</sup> as much as six years earlier is irrelevant. In fact, it is not even in dispute. Rather, it is the VCPA’s lack of reasonable basis in fact and law is its failure to even allege much less demonstrate a fairly traceable causal connection between these

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analysis reaches the substantive *merits* of a usurpation action; not the threshold jurisdictional question whether the action is justiciable throughout all stages of the action. Ironically, the VCPA fails to raise any of the legal exceptions to the mootness doctrine (public necessity, repetition); all of which is irrelevant since the district court, while holding Ms. Davis action as moot, nonetheless substantively analyzed the VCPA’s usurpation action applicable not only to Cowles, Smith, Keithly, but to Davis as well.

<sup>14</sup> Reply Brief, p. 10. We dispute this claimed authority. The VCPA does not have authority to investigate mere procedural irregularities in the election process. Rather, the Secretary of State and the county clerk are vested with the responsibility to investigate, supervise, and administer the procedural election process. The Idaho Secretary of State is the chief election officer of the State and has the “responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws”. (I.C. § 34-201). The Idaho Secretary of State is responsible to provide all such comprehensive directives and election laws to all county clerks. (I.C. § 34-201). Pursuant to I.C. § 34-206, the county clerk exercises general supervisory authority pertaining to the

administration of the election laws by each local election official in his county for the purpose of achieving and maintaining a maximum degree of correctness, impartiality, efficiency, and uniformity in such administration by local election officials.

Pursuant to I.C. § 34-214.

(1) Whenever it appears to a county clerk that any local election official in his county has failed to comply with any election law or any directive or instruction prepared and issued by the county clerk, the county clerk may issue an order to such local election official....

(2) If the local election official fails to comply as directed by the order of the county clerk, the county clerk may apply to a judge of the district court ... to compel the local election official to comply with the order of the county clerk or to show cause why he should not be so compelled.

<sup>15</sup> I.C. § 34-2007 vests standing to only a qualified elector to contest a procedural error in an election. The VCPA is not an elector.

<sup>16</sup> Pursuant to I.C. § 34-2008, a procedural error must be challenged within twenty days. No elector or estranged candidate brought such a challenge asserting a denial of due process by virtue of said error.

uncontested *de minimus* procedural irregularities and a material impact to the *result* of the election process rendering the incumbent a usurper.<sup>17</sup>

The district court correctly distinguished between an election contest which, if timely brought, may focus upon *procedural* irregularities in the election process and usurpation of office, which is a *substantive* examination of the incumbent. The district court reasoned that

Usurpation of office is a substantive examination of the incumbent; that is, his or her eligibility to lawfully hold title of an officer. Examples of usurpation occur when an elected official has been convicted of a felony or perhaps they did not live in the district where they were required to live. These are classic substantive conditions for an incumbent to lawfully hold a particular office. No such substantive conditions have been established here.<sup>18</sup>

Could a procedural irregularity have served as a valid election contest if timely brought by an elector or estranged candidate where the resultant election was materially impacted? Could a procedural irregularity substantively render an incumbent a usurper of office?<sup>19</sup> Perhaps but the simple fact is that the aforementioned procedural irregularities went unchallenged and uncontested. Unlike *Tiegs*, the result of the election process is not in dispute. As the sole candidate in their respective election processes, the *result* of the election process is governed by I.C. § 31-4306(2) which mandated that the election was cancelled and that Ms. Davis, Mr. Smith, and Mr. Roberts must be declared “elected as director” *with* “authority of law”. Thus, whether by election contest or usurpation, the VCPA’s nexus is entirely speculative; that a lack of strict

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<sup>17</sup> Certainly, a procedural irregularity *could also* amount to a substantive evaluation of an incumbent empowering a prosecutor to bring an action. However a mere duty to investigate does not vest a prosecutor with standing to bring a frivolous action. *People ex rel. Neilson v. Wilkins*, 101 Idaho 394, 396, 614 P.2d 417, 419 (1980); *Tiegs v. Patterson*, 79 Idaho 365, 368, 318 P.2d 588, 589 (1957)(“*Tiegs I*”); *Tiegs v. Patterson*, 81 Idaho 46, 48, 336 P.2d 687 (1959)(“*Tiegs II*”).

<sup>18</sup> R. Vol. I, p. 20.

<sup>19</sup> For example in *Tiegs v. Patterson*, Patterson’s standing was not based upon his challenge of the *procedural* error in the election. *Tiegs II*, 81 Idaho at 48. Rather, Patterson’s challenge was that he *substantively* won the election having received the majority of the votes as evidenced by the actual ballot boxes. “[A]ppellant, alleging ... he had received the majority of the votes cast, has brought this action under the usurpation statute, and has not in any [way] contested the election.” *Id.*

adherence to the notice statutes *might* have impacted the election process and *could* have prevented a candidate from filing a declaration of candidacy. Any impact of an unchallenged procedural error is speculative and ineffectual to void an election much less oust an incumbent years after the fact. The VCPA cannot escape attorney fees in reliance upon a purported duty to investigate the merits of procedural claims absent a concomitant substantive impact to the election results.

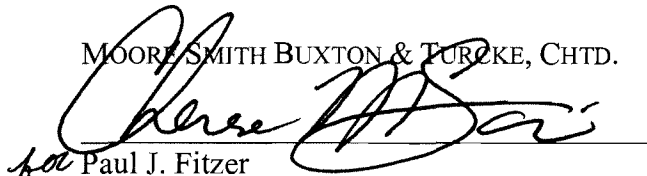
The VCPA further asserts that the Respondents lacked standing to seek attorney fees because the SVCRD indemnified its directors for actions undertaken within the course and scope of SVCRD business.<sup>20</sup> The VCPA fails to cite to any authority that precludes an award of attorney fees for frivolous litigation merely because a third party indemnifier paid the defense costs.

### III. CONCLUSION

For the reasons stated herein, Defendants respectfully request that this Court affirm the district court's Decision but for its summary denial of attorney fees; directing the district court to award the Defendants' reasonable attorney fees and costs both below and on appeal.

Dated this 20<sup>th</sup> day of June, 2012.

MOORE SMITH BUXTON & TURCKE, CHTD.

  
for Paul J. Fitzer  
Attorney for the County  
Defendants/Respondents

\* \* \*

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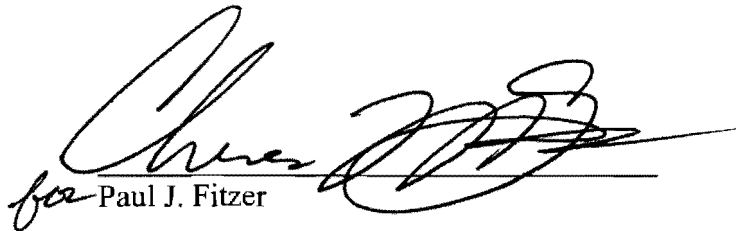
<sup>20</sup> The VCPA's allegation pertains to facts that are not in evidence and further are simply incorrect. By way of candor to the Court, attorney fees are most certainly disputed as between the current SVCRD and its former directors. Whether the dispute is rendered moot or will ripen into a justiciable case or controversy is dependent upon this Court's resolution of the attorney fee issue. Given that all of the alleged procedural errors are attributable to negligent or wrongful acts or omissions committed within the course and scope of the SVCRD election process, it is an open question whether the SVCRD is required to indemnify its former directors pursuant to I.C. § 6-903 or common law doctrines such as *Respondeat Superior* or whether the former directors are required to defend themselves and/or reimburse the SVCRD.

**CETIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on the 20<sup>th</sup> day of June, 2012, I caused to be served a true and correct copy of the foregoing **RESPONDENT/CROSS-APPELLANTS' REPLY BRIEF** by the method indicated below, and addressed to the following:

Matthew C. Williams  
Valley County Prosecuting Attorney  
Kenneth R. Arment  
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for Paul J. Fitzer

**CERTIFICATE OF ELECTRONIC COMPLIANCE**

I hereby certify that a true and correct copy of the foregoing RESPONDENT/CROSS-APPELLANTS' REPLY BRIEF was this 20<sup>th</sup> day of June, 2012 in the manner as set forth in I.A.R. 34.1 electronically served upon the following individuals and in the corresponding manner:

Matthew C. Williams  
Valley County Prosecuting Attorney  
Kenneth R. Arment  
Valley County Deputy Prosecuting Attorney  
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for Paul J. Fitzer